

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

TYLER R.,

Claimant,

vs.

REGIONAL CENTER OF ORANGE
COUNTY,

Service Agency.

OAH Case No. 2011060671

DECISION DENYING APPEAL

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on September 27, 2011, in Santa Ana. The record was closed and the matter submitted for decision at the conclusion of the hearing.

Claimant, who was not present, was represented by his parents.¹

Paula Noden, Manager, represented the Regional Center of Orange County (Service Agency).

ISSUE

Does Claimant have a developmental disability making him eligible for regional center services under the Lanterman Developmental Disabilities Services Act?

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a 16-year-old male on whose behalf regional center services were requested from the Service Agency by his mother no later than January 31, 2011.

¹ Initials and family titles are used to protect the privacy of Claimant and his family.

2. On June 7, 2011, Service Agency staff informed Claimant's biological parents that Claimant had been found ineligible for regional center services.

3. On June 13, 2011, and before the Service Agency issued a formal Notice of Proposed Action, a Fair Hearing Request on Claimant's behalf was submitted to the Service Agency by his mother, which appealed the denial of eligibility.

4. On June 24, 2011, Claimant's mother, step-father and grandmother participated in an Informal Conference with Service Agency staff to discuss the issue of Claimant's eligibility for services. Based on the information presented at that meeting, the parties agreed that the Service Agency would refer Claimant for an assessment by Dr. Robert Patterson, which was later scheduled for July 13, 2011.

5. As a result of the agreement to have Claimant assessed, the initial hearing date of July 26, 2011, was continued at the request of Claimant's mother to the instant date. In making the request for a continuance of the hearing date, Claimant's mother executed a written waiver of the time limit prescribed by law for holding the hearing and for the administrative law judge to issue a decision.

Claimant's Background

6. Claimant has always lived at home. His biological parents are now divorced. He lives primarily with his biological father, but also visits his biological mother and his step-father on weekends. Claimant has an older brother in college locally, who is reported to have been diagnosed with Asperger's Syndrome.

7. As an infant, Claimant was determined to be eligible for Early Start services with the Service Agency under the category of At-Risk due to Delays in Language and Hypotonia. He received services through that program until the age of three, at which time it was determined that he was ineligible for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act). Although he had been diagnosed by then with mild cerebral palsy, the Service Agency determined that his condition was not substantially disabling. That determination was not appealed.

8. Claimant has received special education services through his local public school district for the past several years. In 1998, the school district initially deemed him eligible for such services based on the category of Expressive/Receptive Language Disorder.

9. By 2002, Claimant had been diagnosed with Attention Deficit Disorder (the precursor of the current diagnosis of Attention/Deficit-Hyperactivity Disorder, or ADHD) and was prescribed medications, which he continues to take.

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10. In 2004, Claimant was reading at grade level, but his fluency was slow. He was at grade level in math, but he had difficulty with timed tests. These problems were believed to be caused by motor problems related to his cerebral palsy. Claimant was in a regular classroom, but also received additional resources, such as tutoring, speech therapy, occupational therapy (OT) and adapted physical education (APE).

11. In 2004, Claimant was eligible for special education services under the category of Speech and Language Disorder. He was administered the Wechsler Intelligence Scale for Children – Third Edition (WISC-III). His Verbal I.Q. score of 81 was classified as low-average, his Performance I.Q. score of 95 was classified as average, and his Full-Scale I.Q. score of 86 was classified as low-average. The discrepancy between his verbal and non-verbal scores was explained by his language impairment.

12. In 2006, the school district also made Claimant eligible for special education services under the category of Orthopedic Impairment, which was related to his diagnosis of cerebral palsy. During his tri-annual review, it was noted that he was below grade level in all areas. His performance on the WISC-IV was classified to be in the borderline range of cognitive abilities, as he had a full-scale I.Q. score of 70. He again exhibited average to low-average scores in non-verbal reasoning, but was very delayed in his verbal-related skills. His academic scores were widely scattered, exhibiting average range skills in some areas like math, spelling and calculation, low-average range in other areas, and well-below average in written expression and writing fluency.

13. In 2009, Claimant was again assessed by his school district. His cognitive skills were determined to be in the low-average range. His academic skills were determined to be in the average range for math, but very low for written expression. Overall, it was felt that Claimant's performance in the area of written expression was significantly lower than predicted based on how he did in other areas.

14. (A) In the fall of 2010, Claimant's mother asked staff at Kaiser Permanente (Kaiser) to conduct a psychological evaluation of her son to rule out the presence of an autism spectrum disorder.

(B) Her major areas of concern included that Claimant repeated words and phrases over again, had difficulty initiating and reciprocating conversations, had trouble developing and maintaining friendships, was often teased/bullied, engaged in frequent temper tantrums, was too rigid, had intense interest in certain topics, and was not performing well in school.

(C) Claimant was given tests aimed at detecting the presence of autistic-like qualities. For example, Claimant's score on the Autism Diagnostic Observation Schedule-Module 4 (ADOS-4) was measured to be below the cut-off for Autistic Disorder but elevated enough to place him on the spectrum of autistic-related disorders.

(D) The clinical psychologist who conducted the evaluation, Dr. Amalia G. Mena, noted that Claimant presented with a complex history of developmental delays which have been difficult to tease out over the years. Although Claimant had shown improvement in his language and socialization skills, he was still impaired. Dr. Mena diagnosed Claimant with Pervasive Developmental Disorder Not Otherwise Specified (PDD-NOS), but did not diagnose him with Autistic Disorder.

(E) It is generally accepted among those who diagnose mental and developmental disorders that the term “autistic spectrum disorder” applies to a number of diagnoses provided for in the Diagnostic and Statistical Manual of Mental Disorders (DSM) IV-TR² under the umbrella of Pervasive Developmental Disorders, including Autistic Disorder, Rett’s Disorder, Asperger’s Disorder, PDD and PDD-NOS. According to the DSM IV-TR, a diagnosis of PDD-NOS is appropriate when there is not enough criteria to make a diagnosis of Autistic Disorder, Asperger’s Disorder or PDD.

15. In November 2010, Claimant’s mother also requested Kaiser staff to conduct a speech and language evaluation. Claimant demonstrated a moderate-to-severe impairment of receptive and expressive language skills. This finding confirmed what school district staff had known many years before.

16. In December 2010, Claimant’s mother also had Dr. Mena of Kaiser conduct an adaptive assessment, because she was concerned that Claimant would be unable to care for himself or function independently. Dr. Mena used the Vineland Adaptive Behavior Scales-Second Edition (Vineland-II). Claimant was scored in all areas of adaptive ability as being either lower or significantly lower than people his age, except for his motor skills, which were scored in the low end of the adequate range. Dr. Mena concluded that Claimant’s deficits in his adaptive skills were impairing his ability to function independently. She recommended that Claimant work with a provider to help Claimant deal with his social anxiety and mood shifts. Goals for such a program would include a positive behavior support plan that facilitates his motivation toward increasing his independence, increasing his social interactions with family and peers, and maintaining his hygiene and dress. Dr. Mena also notes that in the future Claimant may require independent living services and a job coach.

17. As a result of Dr. Mena’s diagnosing Claimant with PDD-NOS, the school district added Autism as a category for Claimant’s eligibility for special education services. That category includes not just individuals who have Autistic Disorder, but also anyone who exhibits autistic-like behaviors. It is not clear that any particular special education service previously provided was altered due to this updated category of eligibility.

² The DSM IV-TR is published by the American Psychiatric Association. The DSM IV-TR is a highly respected and generally accepted tool for diagnosing mental and developmental disorders.

18. As of the early spring of 2011, Claimant was in high school. He was receiving mostly A's in his classes. He was enrolled in four out of six periods of specialized academic instruction, referred to as directed studies. In directed studies, Claimant is in a class with five other students, one teacher, two aides, and is provided with academic supports. Overall, three-quarters of his time was spent in directed studies; one-quarter of his time was spent in regular classrooms. His teachers reported that he worked hard, completed his homework and had a good attitude. In his most recent California standardized school testing, Claimant was rated as having basic skills in math and history, and above basic skills in English language and science. According to his most recent Individualized Education Program (IEP), with the accommodations of additional time on tests and assignments, the option of using a word processor to write, and the use of a calculator, Claimant was expected to meet the same academic standards as typical students. School district special education staff stated in a report written for use in this matter that Claimant was on track to timely graduate and that his grade point average was 3.8.

The Service Agency's Assessment of Claimant

19. Claimant's mother contacted the Service Agency for an intake assessment on January 31, 2011. On March 7, 2011, Senior Service Coordinator Lori Burch met with Claimant and his biological parents, and conducted a comprehensive social assessment of Claimant. She referred Claimant's charts to the Service Agency's staff specialists for review.

20. By May of 2011, available medical records were reviewed by Arleen Downing, M.D., and Shirley Brinson, R.N. They noted that Claimant had been diagnosed with mild cerebral palsy. The medical records revealed to them the following deficits caused by that condition: his writing was large but legible; his hands tire easily; he had mild motor delays, but otherwise normal neurological examination findings by other physicians; no spasticity was noted; Claimant had participated in regular P.E. and A.P.E. classes at school without incident, and A.P.E. was no longer needed; he had made significant progress in the areas of gross and fine motor movements; an OT report issued in 2011 indicated his gross motor skills were age appropriate. No evidence of seizures was noted in the medical records. Under these circumstances, the medical specialists concluded that Claimant's deficits caused by his mild cerebral palsy are not substantially disabling.

21. Service Agency staff psychologist Kyle Pontius reviewed Claimant's records. Dr. Pontius completed his review by early May of 2011. He noted the following. Although Claimant's diagnosis of PDD-NOS is not considered to be autism by the regional center system, it can be considered under the fifth category as a condition "like mental retardation" depending on the circumstances. Claimant's intelligence level ranges from the mid-borderline to low-average which, while lower than most of his peers, is not low enough to be seen as "like" mental retardation. Nor was he receiving services from the school district that are "like" those received by persons with mental retardation. Claimant did demonstrate substantial disability in the area of self-direction. He demonstrated deficits in self-care and living skills. However, many of those deficits appeared to be due to a lack of motivation or his poor choices, such as whether or not to bathe, using his hands to eat instead of utensils,

etc. Dr. Pontius concluded that Claimant does not have a fifth category condition or autism as defined by the Service Agency.

22. On June 8, 2011, an Interdisciplinary Eligibility Committee Conference was conducted by Service Agency staff to determine Claimant's eligibility for services. The above-described information was reviewed and discussed, as well as other information and records obtained by the Service Agency. The Committee concluded that Claimant was not eligible for regional center services because he does not meet the criteria for autism, he is not mentally retarded, he does not have a seizure disorder, and a fifth category condition is not apparent. Although Claimant has mild cerebral palsy, he did not demonstrate being substantially disabled in three major life activities due to that condition.

Claimant's Evidence and Evaluations

23. Claimant's mother testified that he was slightly delayed at age three, but that over time his delays and deficits have increased. Claimant has presented a complex set of developmental delays that have taken years to emerge and be identified, thus explaining the timing of the instant eligibility request.

24. Claimant's parents' primary concern is that their son will not be able to live independently when he turns 22 and phases out of special education. They would like him deemed eligible, in part, so that they can set up a support network for him, like a conservatorship and getting him qualified for Social Security benefits. Claimant's step-father testified that he envisions Claimant also needing a multitude of services to help him gain independence, such as job coaching, adaptive skills training and supported living services.

25. Claimant's biological parents believe that Claimant's progress at school is deceptive. For instance, Claimant's grandmother was a special education teacher who advised Claimant's father to always place Claimant in the least restrictive environment. Claimant's parents describe Claimant's classroom environment as closer to a special day class attended by those who are disabled than to a regular classroom with typical students. They also believe that Claimant's grades do not accurately depict his true ability because Claimant has received many supports to assist him, and expectations and grading scales are lowered for him. They question whether Claimant in fact will be able to graduate on time.

26. Although Claimant's parents have seen in their son characteristics associated with Autistic Disorder, neither of them testified that they believe their son has autism. They do believe, however, that his PDD-NOS diagnosis puts him on the spectrum of autistic disorders. Neither of them believes that their son is mentally retarded. They do believe, however, that their son functions like someone who is mentally retarded, and requires treatment similar to one who is mentally retarded. For example, they describe Claimant as follows:

A. He has no safety awareness, in that he will cross a street without looking for traffic. He similarly cannot be trusted to ride his bike to school.

B. He has poor hygiene and self-help skills, and must be constantly reminded to bathe himself, how to dress himself. He has little or no ability or interest in making meals for himself. There is evidence, however, that Claimant has not made a priority of his appearance, and therefore is resistant to engage in hygiene tasks.

C. He has no self-direction and rarely initiates activity. He must be constantly told to do things. He needs tasks broken down into easier steps and must be reminded many times to do simple things, such as zipping his pants and putting on a jacket.

D. Claimant's mother describes her son as functioning like a 10-year-old child. He has no friends and is unable to initiate or maintain social relationships.

27. To a large degree, Claimant's parents relied on the results of the psychological evaluation conducted by Dr. Patterson to support their argument that Claimant has a fifth category condition. Dr. Patterson administered a number of psychometric tests to Claimant, including those testing Claimant's cognition, achievement functioning, language skills, attention skills, behaviors, social-emotional functioning, and adaptive skills. He also reviewed significant amounts of records provided by the Service Agency and Claimant's parents.

28. Claimant's parents point out that, in many aspects of the cognitive and intellectual functioning tests administered by Dr. Patterson, Claimant performed at borderline levels or just above the high end of the cut-off for mental retardation. Overall, Dr. Patterson's test results showed a mixed picture of Claimant's cognitive and adaptive abilities. For example:

A. Dr. Patterson wrote in his report that Claimant "performed quite variably Cognitively and Processing-wise." He found that Claimant was well below-average in cognitive efficiency; his crystallized intelligence and visual-spatial thinking were in the borderline range; and his processing speed and aspects of memory retrieval were significantly below the average range. In terms of Claimant's adaptive skills, based on his parent's input provided through the Adaptive Behavior Assessment System II (ABAS-II), Claimant performed significantly below average range in all areas.

B. On the other hand, Dr. Patterson described Claimant's auditory processing as in the average range, and his phonetic awareness in the average range. There were significant portions of achievement testing, mainly the WRAT-4 and the PIAT-R, in which Claimant obtained scores in the mid-80s, 90s and even low 100s, which are solidly in the average range. And on the Street Survival Skills Questionnaire (SSSQ), which measures adaptive skills, Claimant scored a 97, which is in the average range.

C. In terms of academics, Claimant performed in the mid-low-average range for reading recognition, mathematics, recognition spelling, calculations and production spelling. Yet, his skills were in the borderline range for written expression and reading comprehension.

29. Dr. Patterson touched on these discrepancies in his report. In his summary, he notes with interest that in the long-term retrieval part of the achievement functioning, which is a measure of learning, the testing showed that a time delay allowed Claimant to take material, in which he was performing in the very low-borderline range, and reorganize it such that he could perform in the low-average range. Dr. Patterson also noted with interest that Claimant had never been placed in a traditional severely handicapped special day class but rather had been placed in a resource specialist program, which he described as normally for students who perform above the region of those having serious handicaps. He also noted that such a placement was consistent with Claimant's relatively high test scores on the SSSQ adaptive test, as well as his more elevated scores in achievement functioning and general verbal and thinking abilities.

30. Based on his comprehensive testing and record review, as well as his interview of Claimant and his parents, Dr. Patterson gave Claimant an Axis I diagnosis of PDD-NOS, based on the prior report of Dr. Mena. He made no specific Axis II diagnosis, but rather deferred a diagnosis, indicating that he still had insufficient information to support a diagnosis. Axis II is the area in which mental retardation or the presence of cognitive disorders would be diagnosed. Dr. Patterson recommended that Claimant's parents encourage him to participate in social activities, like getting him a gym membership. In terms of adaptive skills, he recommended that the school district help devise a program to give Claimant an incentive to develop and use proper skills. Dr. Patterson also recommended that the Service Agency could assist Claimant's parents in meeting with school district staff to develop programs that may benefit Claimant's adaptive skills at school and in the community, as well as improve his pragmatic language skills.

Service Agency's Rebuttal

31. Dr. Peter Himber testified during the hearing. He is the Service Agency's Chief Medical Officer. He opined that Claimant does not present as a person who functions like a mentally retarded person. For example, many of Claimant's cognitive test scores have been in the low-average range. Dr. Himber testified that Claimant has done better at school, and has been given less extensive resources, than he would expect for someone who functions similar to a mentally retarded person. Dr. Himber opined that a person in such a condition would not be able to take a pre-algebra or computer studies class in high school, and would not receive As in such classes, as Claimant has done.

32. Dr. Kyle Pontius also testified. He is a staff psychologist for the Service Agency. He testified that Claimant is not mentally retarded and does not present as one with a similar condition. Dr. Pontius is aware that Claimant scored in the borderline range in some of the psychometric tests administered by Dr. Patterson. But Dr. Pontius is also aware of various aspects of the testing in which Claimant scored in the average or low-average ranges. Dr. Pontius opined that a person functioning like a mentally retarded person would be expected to perform in the borderline range in all aspects of the testing without such variance and scatter. Dr. Pontius testified that Claimant's average range score on the SSSQ is a more reliable predictor of Claimant's adaptive ability than the Vineland-II or ABAS-II tests, which

are based on parental answers that can be subjectively depressed. Dr. Pontius also opined that Claimant has performed better at school, and with fewer resources, than a mentally retarded person. Moreover, he testified that mentally retarded individuals normally take vocational training in high school, as opposed to academic courses, and that they are generally not on track to timely graduate with their peers. The fact that Claimant is on track to graduate from academic coursework indicates to Dr. Pontius that Claimant is functioning higher than a mentally retarded person. Dr. Pontius also noted that Claimant has appeared to gain insight from psychological services provided by Kaiser, such as therapy and anger-management. He opined that a mentally retarded person would not benefit from such services.

33. The opinions expressed by Drs. Himber and Pontius were consistent with the record presented in this case and were persuasive. They have both given credible explanations why Claimant's psychometric testing in some areas can be in the borderline range and yet not establish that Claimant has a condition similar to one who is mentally retarded. They also persuasively explained how Claimant's performance at school is inconsistent with a fifth category condition. On the other hand, Dr. Patterson's report does not make a diagnosis for Claimant consistent with one who is mentally retarded, nor does he recommend Claimant receive the type of services that would benefit a person who functions like a mentally retarded person. If anything, the cryptic remarks made by Dr. Patterson in his report summary are more consistent with the opinions expressed by Drs. Himber and Pontius than inconsistent.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.³) An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary regional center decision. (§§ 4700-4716.) Claimant requested a hearing and therefore jurisdiction for this appeal was established. (Factual Findings 1-5.)

2A. Where an applicant seeks to establish eligibility for government benefits or services, the burden of proof is on him. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.)

2B. With regard to the issue of eligibility for regional center services, "the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS (California Department of Developmental Services) and RC (regional center) professionals'

³ All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

determination as to whether an individual is developmentally disabled.” (*Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127.) In *Mason*, the court focused on whether the claimant’s expert witnesses’ opinions on eligibility “sufficiently refuted” those expressed by the regional center’s experts that claimant was not eligible. (*Id.* at p. 1137.)

2C. Based on the above, Claimant in this case has the burden of proving by a preponderance of the evidence that his evidence regarding eligibility is more persuasive than the Service Agency’s.

3. An applicant is eligible for services under the Lanterman Act if he can establish that he is suffering from a substantial disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism or what is referred to as the fifth category (a condition similar to mental retardation or which requires treatment similar to that required by those who are mentally retarded). (§ 4512, subd. (a).) A qualifying condition must also onset before one’s 18th birthday and continue indefinitely thereafter. (§ 4512.)

Does Claimant Have Autism?

4. It does not appear that the Legislature intended to include autistic spectrum disorders such as Asperger’s Disorder, PDD or PDD-NOS in the category of “autism” for purposes of eligibility for regional center services. The Legislature has amended the Lanterman Act, including section 4512 (regarding eligibility), since it was first enacted, but has not changed the list of qualifying conditions to include “autistic spectrum disorders.” The Legislature is apparently aware of the difference between autism and autistic spectrum disorders, as demonstrated by its enactment in 2001 of section 4643.3, which refers to “autism disorder and other autistic spectrum disorders.”⁴ If the Legislature wished to add other autistic spectrum disorders to the list of qualifying conditions under section 4512, it could have done so. It is a cardinal rule of statutory construction that, where the Legislature has utilized a term of art or phrase in one place and excluded it in another, it should not be implied where excluded. (*Pasadena Police Officers Association v. City of Pasadena* (1990) 51 Cal.3d 564, 576.) Therefore, the word “autism” under section 4512, subdivision (a), is seen to refer to the Autistic Disorder diagnosis of the DSM IV-TR, which is the disorder considered to be “autism,” and not to “autistic spectrum disorders,” such as Asperger’s Disorder, PDD or PDD-NOS.

5. In this case, Claimant failed to meet his burden of establishing by a preponderance of the evidence that he has the qualifying condition of autism. Although Dr. Mena diagnosed Claimant with PDD-NOS, she did not diagnose him with Autistic Disorder. No other health care provider or expert has done so. The Service Agency’s staff has concluded that Claimant does not have autism. Although PDD-NOS is considered to be in

⁴ Section 4643.3, subdivision (a)(1), provides, in pertinent part, “the department shall develop evaluation and diagnostic procedures for the diagnosis of autism disorder and other autistic spectrum disorders.”

the spectrum of autistic-related disorders, it is not autism for purposes of eligibility under the Lanterman Act. (Factual Findings 6-33.)

Is Claimant Substantially Handicapped by Cerebral Palsy?

6. There is no dispute that Claimant has a mild form of cerebral palsy, which is one of the five categories of eligibility for regional center services. However, to be eligible for services, one must also establish that he is substantially disabled by such a condition.

7. A “substantial disability” is defined by California Code of Regulations, title 17, section 54001, subdivision (a), as a condition which results in major impairment of cognitive and/or social functioning, and which causes significant functional limitations in three or more of the following areas of major life activity, as appropriate to the person’s age: (a) receptive and expressive language; (b) learning; (c) self-care; (d) mobility; (e) self-direction; (f) capacity for independent living; and (g) economic self-sufficiency.

8. In this case, the Service Agency’s medical specialists concluded that Claimant’s mild cerebral palsy is not substantially disabling. None of the medical or school records presented by Claimant links his cerebral palsy to any of his cognitive or adaptive deficits. No evidence has been presented indicating that any expert has opined that Claimant’s cerebral palsy is substantially disabling to him. Under these circumstances, Claimant’s diagnosis of cerebral palsy does not make him eligible for regional center services. (Factual Findings 6-33.)

Is Claimant in the Fifth Category?

9. It is clear that Claimant is not mentally retarded. However, his parents argued that he should be eligible for services under the “fifth category,” which is described as “disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals.” (§ 4512, subd. (a).) A more specific definition of a “fifth category” condition is not provided in the statutes or regulations. Whereas the first four categories of eligibility are very specific (e.g., autism, epilepsy, cerebral palsy, and mental retardation), the disabling conditions under this residual fifth category are intentionally broad so as to encompass unspecified conditions and disorders. But the Legislature requires that the condition be “closely related” (§ 4512) or “similar” (Cal. Code Regs., tit. 17, § 54000) to mental retardation. “The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded.” (*Mason v. Office of Administrative Hearings*, *supra*, 89 Cal.App.4th at p. 1129.)

10. The recent appellate court decision in *Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462 has suggested that eligibility in the fifth category may be based largely on the established need for treatment similar to that provided for individuals with mental retardation, and notwithstanding an individual’s relatively high level of intellectual functioning. The *Samantha C.* court confirmed that

individuals may qualify for regional center services under the fifth category on either of two independent bases, with one basis requiring only that an individual require treatment similar to that required for individuals with mental retardation. However, in order to remain consistent with the holding in *Mason v. Office of Administrative Hearings, supra*, 89 Cal.App.4th 1119, eligibility under the second prong of the fifth category still must be viewed as within the context of services and supports similar to and targeted at improving or alleviating a developmental disability similar to mental retardation.

11A. In this case, Claimant failed to meet his burden of establishing by a preponderance of the evidence that he has a fifth category condition. (Factual Findings 6-33.)

11B. It was not established that Claimant's condition is closely related to mental retardation. School records reveal that Claimant has obtained mixed cognitive and academic test scores, showing below-average or borderline abilities in some areas, but average or low-average ability in other areas. The IEPs and other school records consistently show that Claimant, while performing lower than many of his peers, is still functioning in school on a much higher level than would a mentally retarded person. In fact, there are no school records in which Claimant is described or depicted as having cognitive or adaptive deficits similar to a mentally retarded person. The Service Agency's experts persuasively opined that Claimant does not function similar to a mentally retarded person. There is a lack of information from Dr. Mena, any other Kaiser health care specialist, or Dr. Patterson, which can be viewed as sufficiently refuting the opinions expressed by the Service Agency's experts.

11C. The inquiry shifts to whether Claimant requires treatment (i.e., services and supports) similar to that required for mentally retarded individuals. As Dr. Mena noted, Claimant presents a complex history of developmental delays that have been difficult to tease out over the years. Yet, he is still a teenager. The vast majority of services that have been provided to him after he left the Early Start program have been through the public school system. Claimant's school records indicate that, although he has been provided with significant special education services, he has not been treated similar to a mentally retarded person. By all accounts in the school records, Claimant is taking classes too advanced for a mentally retarded person, is getting good grades and, as of last spring, was on track to timely graduate with his peers. The skepticism of Claimant's parents with their son's progress at school was insufficient to refute what the school records clearly depict. The services provided to Claimant by Kaiser, other than diagnostic testing and evaluation, appear focused on counseling and therapy. Dr. Pontius of the Service Agency persuasively testified that the insight gained from that treatment would be lost on a person with a condition similar to mental retardation. While Dr. Mena of Kaiser indicates that Claimant *may* need independent living services and a job coach in the future, that appears to be speculation at this time. Her other service recommendations imply that Claimant has the ability to care for himself and interact socially, he just needs to be motivated to do so and be provided with the opportunity. Dr. Patterson made similar recommendations in his report. While the Service Agency's experts are clear that these are not the types of treatment that would be required by a mentally retarded person, there is a lack of evidence from other experts refuting the same.

11D. In light of the record presented in this case, it was not established that Claimant's evidence on eligibility sufficiently refuted those expressed by the Service Agency's experts that Claimant is not eligible.

12. Since Claimant failed to establish by a preponderance of the evidence that he has any of the five qualifying developmental disabilities, he failed to establish a basis of eligibility for regional center services under the Lanterman Act. (Factual Findings 1-33.)

ORDER

Claimant Tyler R.'s appeal is denied. The Regional Center of Orange County's determination that he is not eligible for regional center services is sustained.

DATED: November 14, 2011

ERIC SAWYER,
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.